82-1574

IN THE

Supreme Court of the United States

October Term, 1982

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

PATRICIA COHEN,

Respondent.

RESPONSE TO A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

HERMAN KAUFMAN
LITMAN, KAUFMAN & ASCHE
120 Broadway
New York, New York 10271-0068
(212) 349-6750
Attorney for Respondent

RICHARD M. ASCHE
JACK T. LITMAN
RUSSELL M. GIOIELLA
Of Counsel

Question Presented

Did respondent, by her conduct in once admitting the police into her home to give medical aid to her mortally wounded husband and look for a possible intruder, forfeit forever her reasonable expectation of privacy in her own home, even though, as the prosecutor concedes, respondent did not consent to any of the three subsequent warrantless entries during which the police conducted exhaustive searches and seizures?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

82-1574

IN THE

Supreme Court of the United States

October Term, 1982

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

against

PATRICIA COHEN,
Respondent.

RESPONSE TO A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Respondent submits this brief in opposition to the Petition for a Writ of Certiorari to review a ruling of the Court of Appeals of New York, entered February 8, 1983, unanimously affirming an Order of the County Clerk, Westchester County, dated April 27, 1981, granting respondent's pretrial motion to suppress physical evidence under the Fourth Amendment.

Opinions Below

The opinion of the County Clerk, Westchester County, rendered April 27, 1981, granting respondent's pretrial motion to suppress evidence under the Fourth Amendment, is unreported and is reproduced in petitioner's Appendix A.

The opinion of the Appellate Division of the Supreme Court of New York, Second Judicial Department, rendered April 26, 1982, unanimously affirming the decision of the County Court, is reported at 87 A.D.2d 77, 450 N.Y.S.2d 497 (2nd Dept. 1982) and is reproduced in petitioner's Appendix B.

The opinion of the Court of Appeals of New York rendered February 2, 1983, unanimously affirming the decision of the Appellate Division, has not yet been reported, but is reproduced in petitioner's Appendix C.

Jurisdiction

The Order of the Court of Appeals of New York constitutes a final judgment and is thus sufficient to invoke this Court's jurisdiction under 28 U.S.C. §1257(3) to consider the petition for *certiorari*.*

Constitutional Provisions Involved

Amendment IV provides as follows:

The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

---

* New York law permits the prosecution to appeal pretrial suppression orders, provided that the prosecutor stipulates that without the evidence suppressed, the proof available to the prosecutor is "either (a) insufficient as a matter of law, or (b) so weak in its entirety that any reasonable possibility of prosecuting such charge to a conviction has been effectively destroyed." New York Criminal Procedure Law §450.50.

Statement of the Case

The Facts

Prior to her retrial* on an indictment charging her with the death of her husband, Dr. Seymour Cohen, respondent obtained a hearing on her constitutional claim that the police seized certain evidence from her home without a warrant and in violation of the Fourth Amendment, the warrantless seizures having been conducted on September 25, October 1 and October 6, 1976. County Court's findings, unanimously affirmed by the appellate courts below, are as follows:

At approximately 11:30 p.m. on September 24, 1976, respondent telephoned the police to report that she had awakened to find her husband injured from an apparent self-inflicted gunshot wound. A short time later, respondent answered a knock at the door. It was the police. After opening the door, respondent pointed in the direction of the bedroom, upstairs, where her husband lay wounded, and the police entered her dwelling. At no time did respondent ever make a verbal communication to the police which either requested or authorized the police to enter her home. She simply pointed to the bedroom located upstairs.

Once inside the premises, the police administered first aid to the victim, who was observed lying on the bed next to the pistol, bleeding from the head. The police also at-

*Respondent's earlier conviction was unanimously reversed by the Court of Appeals of New York on state grounds, stemming from the improper introduction of evidence tendered to rebut respondent's defense that the victim had sustained a self-inflicted wound. *People* v. *Cohen*, 50 N.Y.2d 908, 443 N.Y.S.2d 446 (1980).

tempted to console respondent, who had reported that her husband had apparently shot himself while respondent was asleep.

Shortly after midnight, Dr. Cohen was taken in an ambulance to a nearby hospital, accompanied by Police Lieutenant Alagno and respondent, who had expressed a desire to be with her husband.

Meantime, two detectives remained at respondent's home and proceeded to conduct a thorough search of the premises, lasting for nearly three hours until 3:00 a.m. The detectives examined the bedroom where Dr. Cohen was discovered, giving special attention to the area around the bed where the victim lay injured. In so doing, the police seized a holster and two notes on a table and two rounds of ammunition and one spent shell casing on the floor behind the bed.

During the search, Lieutenant Alagno returned to respondent's dwelling from the hospital, and the search was extended to other areas of the home. Thus, Alagno and Detective Cioffredi, after seizing the keys to the family car from the pocket of a coat in one of the closets they searched, then went to the garage and conducted a complete search of that area and the vehicle.

The detectives' search was interrupted by a telephone call from the hospital advising that the bullet, which had pierced Dr. Cohen, had passed through his head. Hearing this, the detectives conducted yet another search of the bedroom, locating the slug on the floor behind the bedroom draperies, which had bullet perforations.

The detectives then spoke to a patrolman present at the hospital, which was followed by two telephone calls to the Medical Examiner's office. The search of respondent's dwelling was concluded soon before 3:00 a.m. after the detectives made another search of the premises, including the attic, to make sure that no unlawful intruders were present.

At the hospital, at approximately 2:30 a.m., respondent was questioned by a police officer who was investigating the circumstance of the shooting. Before agreeing to make any statement, respondent made a telephone call from the hospital to an attorney to ask whether she should provide the statement requested by the police officer. The attorney spoke to the officer, told him to take no statement* and instructed him to take respondent home. As found by the County Court,** the attorney advised the officer, "do me a favor, take her right home, and if you need anything, call me."

With the search completed, the detectives, who had taken many photographs, left the dwelling and arranged for a patrol car to watch the home because the police did not have a key; respondent, distraught, after leaving the hospital where her husband had expired, spent the night at the home of her parents.

At 7:00 a.m. the next morning, another detective, named Curto, went to the Medical Examiner's office where he

* The police officer ignored this instruction. The statement taken was subsequently suppressed.

** This finding was made in the course of an opinion granting another pretrial motion (and was made part of the record on appeal in the courts below pursuant to a stipulation between the parties).

learned that one of the medical examiners had suspected that the shooting was a homicide. Curto and a medical examiner went to respondent's home, where they were joined by Lieutenant Alagno and Police Chief Oliva.

Before proceeding to respondent's home, one of the officers contacted the District Attorney's Office to inquire about the necessity for a search warrant. A prosecutor advised that a search warrant was not needed and that the reentry into the respondent's home could be undertaken without a search warrant.

After reentering the home, some eight hours after the conclusion of the initial search, again without a warrant, the officers conducted a "top-to-bottom" search (Appendix A, p.6a). The police then ". . . examined the entire premises and searched throughout, and Curto then took the photos which have been marked Defendant's Exhibit B, D, E, 16, 17, 18, 23, 25, 26, 27 and 28. They lined up the holes in the curtains or drapes with a dummy, and a dowel, and they had Lt Alagno lie on the bed to re-enact the scene. The police seized bedding, a portion of the canopy or drapes, Dr. Cohen's clothing, a nightgown, a coffee cup, two pills or capsules from the bathroom. Respondent then arrived at the condominium with her father at about 12:30 p.m. as the search was going on, and was permitted to take some of her clothing from her son's bedroom but under police surveillance. She did not ask to take anything from her own bedroom, or question the police present in the condominium.

"Now, after September 25th, Detective Curto returned to the condominium on at least two other occasions having padlocked the premises. On October 1st, he seized a wine bottle, and two wine glasses, and took them to the labora-

tory. He also took measurements, which resulted in a drawing which is exhibit 24 in the hearing. He also checked out the TV on that night, in short, on the late morning of September 25th. The police returned after searching the condominium from top to bottom, opening drawers and cabinets and examining contents on October 6th. Curto seized, returned to the condominium and seized green towels and other items. Dr. Cohen's wallet had been seized by Lt. Alagno on the late morning of September 25th when he had returned there. The police never obtained a search warrant, and never asked the defendant directly for permission to search, or seize any items from her apartment." (Appendix A, pp. 5(a)-6(a)).

County Court's Decision Granting the Motion to Suppress

The narrow issue before the County Court was whether respondent, after telephoning the police, permitted the police to make an initial warrantless entry, followed by subsequent warrantless reentries into her home. In deciding this issue, the court was required to determine what inferences to draw from respondent's conduct in answering the police knock at her door, and pointing to the upstairs bedroom where Dr. Cohen lay wounded. Respondent, of course, had never given the police a verbal direction to enter her dwelling.

The Initial Warrantless Entry

The Court ruled that respondent, by her conduct in calling the police to announce that her husband had shot himself, and pointing to the upstairs bedroom, consented to the

initial warrantless entry by the police to perform the following:

1) to administer aid to Dr. Cohen; and

2) to investigate and check out the premises to ascertain whether an intruder was present and locate any possible evidence, especially in the vicinity near the bed where Dr. Cohen was found.

Judge Martin ruled that the initial warrantless entry, lasting from before midnight to 3:00 a.m. on September 25, was legitimately carried out in pursuit of the foregoing two objectives and was thus in accordance with the Fourth Amendment—even though the police did not have a search warrant. This branch of the court's ruling, which was not subject to appellate review in the New York appellate courts, has never been challenged on appeal by either party.

The Subsequent Warrantless Reentries

The County Court condemned the warrantless reentries of September 25, October 1, and October 6. The Court ruled that respondent, by her conduct in answering the police knock and directing the police to the upstairs bedroom, had not authorized any of these warrantless reentries. Respondent, the court concluded, had thus consented only to the initial warrantless reentry into her home.

Additionally, County Court ruled, the police failure to obtain a search warrant for the reentries occurring on September 25, October 1 and October 6 could not be justified under any other exception to the Fourth Amendment. By 10:30 a.m. on September 25, the time of the first warrantless reentry, any emergency occasioned by Dr. Cohen's injuries

had long since passed. Also, there had been ample time for the police to seek the issuance of a search warrant from a magistrate—the reentry on September 25, it will be recalled, had occurred almost eight hours after the police had concluded the first search of respondent's home.

Thus, the County Court ruled that

> "The Court concludes that there is no reasonable view of the evidence which would support a finding that either the emergency exception or the permission continued to the return of the police and medical examiners the next morning, and on subsequent occasions. There is no right of search given to medical examiners which is superior to that of the rights in the constitution. If the police or the medical examiners wanted to examine the condominium, or to have it sealed, they were required to seek Court order. This apparently occurred to the police after they wisely contacted the District Attorney's office but unfortunately were given faulty legal advice." (Petitioner's Appendix A at p. 8a.)

ARGUMENT

Because the petition does not present any Fourth Amendment issues that merit review, *certiorari* should be denied.

The petition for *certiorari* in the present case contains no significant constitutional question justifying review. The real question here was why the police, despite having sufficient grounds for a warrant and ample time to get one, did not seek the issuance of a search warrant before making three separate warrantless reentries (on September 25,

October 1 and October 6) into respondent's home. The failure to seek the issuance of a search warant was thus an error, which cannot be avoided.

The first warrantless search of respondent's home, lasting three hours, was completed at 3:00 a.m. on September 25. At 7:00 a.m., a detective learned that the Medical Examiner suspected the victim's death was a possible homicide. This new information led the investigators to decide that a second warrantless search (and ultimately a third and fourth) of respondent's home was advisable. The investigators wanted to search again for additional evidence of a possible crime and, with the aid of the Medical Examiner, reenact how the victim's death may have occurred.

Decisions of this Court have consistently held that a warrant to search the home must be obtained unless the police are proceeding with probable cause, coupled with exigent circumstances, or the police have obtained the consent of the homeowner to conduct a search without a warrant. *Steagald* v. *United States*, 451 U.S. 204 (1981); *Payton* v. *New York*, 445 U.S. 573 (1980); *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973); *Chimel* v. *California*, 395 U.S. 759 (1969); *Schmerber* v. *California*, 384 U.S. 451 (1948); *Johnson* v. *United States*, 333 U.S. 10 (1948); *Agnello* v. *United States*, 269 U.S. 20 (1925); *see also*, *Florida* v. *Royer*, No. 81-2146, March 23, 1983. None of the foregoing exceptions was established here, and petitioner must therefore be charged with the error in not applying for a search warrant before a magistrate.

There was absolutely no reason not to seek the issuance of a search warrant. That the police were investigating a possible homicide did not excuse the necessity for a warrant. *Mincey* v. *Arizona*, 437 U.S. 385 (1978). Also, there was plenty of time to seek the issuance of a search warrant, and petitioner has conceded throughout these proceedings that there existed no exigent circumstances that rendered a warrant application unworkable or, indeed, even inconvenient to the police.*

Further, petitioner concedes that he "cannot and does not take issue with" findings of the County Court that respondent did not consent to the reentries of the police into her residence either on the morning after her husband had been shot or the reentries occurring five and eleven days later (Petition, p. 9). Petitioner, nonetheless, seeks review of the decisions below, claiming that consent to the reentry was unnecessary because the original intervention by the police was at the "request" of respondent and that petitioner therefore lacked any expectation of privacy in her home. *Cf. Katz* v. *United States*, 389 U.S. 347 (1967).

In short, petitioner would have this Court hold that where a wife, whose husband has been shot in the middle of the night, summons police to aid the victim and secure the premises against the possibility that the shooter might still be lurking about, she is in reality "requesting" the police to search the premises not only when they respond to her initial call for help, but also the next morning, long after the exigency has ended, five days after that, and a week

* Because the police had been ordered to watch respondent's home, and because no one else resided there, there was no threat that anybody would distrub the premises.

after that. Petitioner would further have the Court rule that a "request" made under the circumstances here presented will be transformed after the police finish the business they were "requested" to perform into a perpetual waiver of the right of privacy in the home—even though respondent in the meantime had retained an attorney who had contacted the police and told them to take respondent home and that if they wanted anything further from respondent, they should contact him. (The retention of an attorney prior to the police reentry is completely ignored in the petition.)

Clearly, no genuine issue under *Katz* is raised in this case. The contention, urged in this Court for the first time, that respondent forfeited her reasonable expectation of privacy in the home, is nothing more than a rephrasing of the consent issue, which petitioner agrees was correctly resolved against him in the courts below. Petitioner's claim under *Katz* is founded exclusively on the proposition that there was an "intentional relinquishment of the privacy of the home, . . ." See petition at p. 11. Yet, if respondent did in fact relinquish her right to privacy in the home, this could only occur, on the circumstances here, because respondent *consented* to the police coming into her home repeatedly without a search warant. How else could a homeowner forever relinquish his or her right to privacy in the home, if not by consenting to third parties coming into the home? In short, the question here concerns only the scope of respondent's consent to permitting the police to enter her home without a warrant.

In this Court, petitioner concedes that respondent's consent did not extend to any of the three warrantless re-

entries into respondent's home. That concession is enough to end this Court's inquiry of the matter.

Whether the issue is viewed as the scope of respondent's consent or whether respondent gave up her expectation of privacy in the home, the facts here simply do not support the claim that respondent's conduct was tantamount to a request that the police make repeated warrantless entries into her home. The sole factual basis for the argument that respondent consented to a waiver of her Fourth Amendment rights lay in her conduct, first in telephoning the police on the evening of September 24 to report that she had found her husband injured and, second, her act in admitting the police into the condominium and, without saying a single word, pointing upstairs where her husband lay wounded. Respondent said nothing to the officers either initially or at the time of the reentries (when she was not even present and did *not* let the officers in). Moreover, the officers never *at any time* asked for permission to reenter the condominium without a search warrant. Perhaps most important, *after* the initial entry, *and prior* to any reentry, respondent retained an attorney who specifically advised the police that if they wanted anything further from respondent, the police should contact him. County Court reasonably concluded, after listening to the relevant testimony, that the foregoing conduct of respondent was consistent with authorizing only the initial warrantless entry. This finding was supported by the surrounding circumstances.

Respondent called the police after her husband had been injured. She alone could not dispense whatever aid was necessary to save his life. Her discovery of her husband was late at night, and it was entirely possible that an intrud-

er might still be somewhere in the condominium. Realizing this, County Court ruled that the purpose for her agreeing to admit the police into the condominium was so that her husband could secure aid and to permit the police to carry out a brief, limited investigation extended to the area where the decedent was lying and also to other parts of the premises where it was possible that an intruder might be lurking.

Respondent's consent—as conceded by petitioner and as found by the courts below—was limited to the exigencies of the moment. For example, she did not tell the police to examine the dwelling for the purpose of finding evidence of a possible crime. Nor did she request the police to look for possible clues to help explain how her husband had been wounded. In short, respondent gave absolutely no hint that she would permit any intrusive searches and seizures ultimately performed. She said nothing! To claim that her simple act of telephoning the police and then admitting the officers into the condominium constituted permission for a reentry the next day, for a reentry six days later and for a reentry eleven days later is to stretch logic to the breaking point.

Acceptance of the argument, that respondent's original request that the police enter her home to render medical assistance and search for a possible intruder, resulted in her giving up completely her expectation of privacy in the home would lead to disastrous and absurd consequences. It would mean that respondent, following the departure of the police from her home after the initial entry and search of her home, must be held to have authorized the police to make the following intrusions into her privacy:

1. returning to the condominium the next morning, September 25, when the police conducted an inch by inch search of the premises;

2. making additional seizures of articles of property belonging to Mrs. Cohen during this second search of September 25;

3. cutting off Mrs. Cohen's possessory interests in the premises—the police would only permit her to enter the condominium if she was accompanied by a police escort when she moved through the premises; and

4. making subsequent warrantless searches and seizures at the condominium on October 1 and again on October 6, 1976.

To draw any such inference from the limited conduct displayed here would simply be wrong. To say that respondent permitted the police to make unlimited searches and seizures for an indefinite duration would be no different from arguing that respondent simply decided to turn over possession of her home to law enforcement authorities—simply because there was an original request for the police to enter without a warrant to give aid and look for intruders.

Petitioner, in effect, argues that respondent, by her conduct, converted the inside of a private dwelling to a public place, permanently accessible to all, as in the case of an open field. Compare *Hester* v. *United States*, 265 U.S. 57 (1924); *United States* v. *Case*, 435 F.2d 766 (7th Cir. 1970). Such a claim is astonishing in view of this Court's long standing rule that a person enjoys an exceed-

ingly high expectation of privacy in the home, and this right of privacy is among the most cherished and valuable constitutional guarantees. See *South Dakota* v. *Opperman*, 428 U.S. 364, 367-8 (1976); *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974). The homeowner's right to undisturbed occupancy of the premises is thus afforded the "most stringent Fourth Amendment protections." *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 561 (1976). Accordingly, to secure this right from abridgement, the Court has long insisted, beginning with *Agnello* v. *United States*, *supra*, decided nearly 60 years ago, that the police must not enter the home without a search warrant. *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971); *see also Mincey* v. *Arizona*, *supra*; *Wong Sun* v. *United States*, 371 U.S. 481 (1963).

If respondent no longer desired to be left alone inside her home, if respondent decided to make the inside of her dwelling permanently accessible to the public, in short, if respondent no longer decided to treat her home as a home, this must be established by clear, equivocal and convincing evidence. Where the home is concerned, the Fourth Amendment protects a most special interest, which will not be disturbed, absent compelling proof to the contrary. At bar, respondent's limited conduct in once allowing the police to enter her home without a warrant certainly cannot be the basis for a finding that respondent, in effect, intended to give up her home. Such a ruling would read the Fourth Amendment out of existence, which was certainly not the intention of the drafters of the Constitution.

Finally, it must be stressed that this is not a case where the police returned to the home to retrieve an article, lawfully observed in plain view during an earlier lawful entry

and search of the home, and with respect to which there was thus no reasonable expectation of privacy. At bar, the subsequent warrantless reentries were for the purpose of conducting new, independent searches to uncover new, additional evidence that was not the subject of the initial, earlier search. At no time, during these subsequent warrantless reentries, did the police make any move to secure a warrant to enter respondent's home.

Conclusion

For the reasons set forth above, the petition for a writ of *certiorari* to the Court of Appeals of the State of New York should be denied.

Respectfully submitted,

HERMAN KAUFMAN
LITMAN, KAUFMAN & ASCHE
Attorney for Respondent

RICHARD M. ASCHE
JACK T. LITMAN
RUSSELL M. GIOIELLA
Of Counsel